

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

75-7407

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUDDIE FORT, et al.,

Plaintiffs-Appellants

v.

ROBERT C. WHITE d/b/a
ROBERT C. WHITE CO., REALTORS,

Defendant-Appellee

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

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Defendant-Appellee

On Appeal from the United States District Court
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

QUESTION PRESENTED

Whether the district court erred in refusing to apply,
to a private plaintiff's claim for attorneys' fees under 42
U.S.C. 3612(c), in a successful fair housing action under
Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601
et seq., the presumption favoring awards of such fees ^{1/} estab-
lished by Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400

^{1/} Other issues, not addressed herein, are raised in the brief
of the plaintiffs-appellants.

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(1968) (per curiam); Northcross v. Board of Education, 412 U.S. 427 (1973) (per curiam).

INTEREST OF THE UNITED STATES

The goal of the Fair Housing Act -- elimination of housing discrimination throughout the United States, see 42 U.S.C. 3601 -- is one to which Congress has accorded the highest national priority. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 211 (1972). Section 813 of the Act, 42 U.S.C. 3613, extends some responsibility for the achievement of that goal to the Attorney General. It provides that he may bring a civil action "to insure the full enjoyment of the rights granted by this subchapter" whenever he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of ... [those rights] or that any group of persons has been denied any of ... [those rights] and such denial raises an issue of general public importance...." Thus, the United States is an integral part of the Act's enforcement scheme and has a broad interest in insuring the effectuation of its underlying policy.

The Supreme Court has recognized, however, that, because of the "enormity of the task of assuring fair housing," Trafficante v. Metropolitan Life Insurance Co., supra, 409 U.S. at 211, "the main generating force must be in private suits in which, ..., the complainants act ... 'as private attorneys

general'...." Id. Resolution of the question addressed in this brief -- whether an individual who successfully plays that role is presumptively entitled to an award of attorneys' fees -- may well determine the extent to which future discriminatees will be able or willing to take on the burden of vindicating the important public rights granted by the Fair Housing Act, see Newman v. Piggie Park Enterprises, Inc., supra, 390 U.S. at 402, and may therefore have a substantial effect on the United States' Title VIII enforcement responsibilities in the future.

Our direct interest in this particular case also derives from our having participated, along with the plaintiffs-appellants and the defendant-appellee, in the negotiation, resolution, and entry of a consent decree (Joint App. 22-37) which resolved the injunctive aspects of this case and terminated a parallel suit (Civ. No. H-74-392, D. Conn.) brought by the United States against the same defendant.

STATEMENT

A. Preliminary Statement

Judge M. Joseph Blumenfeld of the District of Connecticut rendered the judgment from which this appeal is taken. His March 13, 1975 Memorandum of Decision (Joint App. 38-64) and June 30, 1975 Judgment are unreported. An earlier, preliminary opinion (Joint App. 11-21) is reported at 383 F. Supp. 949.

B. Procedural History and Facts

This suit began in June, 1974 as a class action for relief from alleged violations of 42 U.S.C. 1982 and section 804 of the Fair Housing Act, 42 U.S.C. 3604. Defendant-appellee White is a Connecticut realtor who, as Robert C. White Co., manages some fifty apartment buildings (approximately 1500 units) in the Hartford metropolitan area. The plaintiffs-appellants are Luddie Fort, a black who unsuccessfully sought an apartment in a White-managed building, and James Bookwalter, a white tenant in one of the defendant's buildings. (Joint App. 11, 38.) Alleging that, through his agents, the defendant had engaged in racially discriminatory rental practices against Fort and other blacks and had thus deprived Bookwalter and persons similarly situated of the benefits of interracial housing (Joint App. 4-7, 38), the plaintiffs sought a declaratory judgment, a preliminary and permanent injunction, compensatory and punitive damages, and reasonable costs and attorneys' fees. (Joint App. 38-9.) The defendants filed a motion to dismiss on June 25, 1974. (See Joint App. 1.) Two days later, following a hearing, the district court denied that motion and the plaintiffs' application for a preliminary injunction from the bench. (Joint App. 12.)^{2/}

^{2/} The court's October 25, 1974 opinion styled Ruling on Motion to Dismiss appears at Joint App. 11-21 and is reported at 383 F. Supp. 949.

On December 17, 1974, the date set for trial, the United States -- having for several months been furnished pertinent information by the plaintiffs' attorney (see Joint App. 70) -- filed its own suit against White under 42 U.S.C. 3613. (Joint App. 39.) Our action was concluded the following day, however, by a consent decree (Joint App. 22-37) which also partially resolved the instant case. That decree -- applicable to both actions and signed by the defendant and his attorney, the attorney for the private plaintiffs, and representatives of the United States -- enjoins White and his agents from engaging in racial discrimination and requires White to adopt and implement an affirmative program of compliance with the Fair Housing Act. The private plaintiffs' attorney actively participated in the negotiation of this decree. (See Joint App. 70.)

The case went to trial on plaintiffs' claims for damages, costs, and attorneys' fees. (See Joint App. 39-40.) On March 13, 1975, the district court entered a Memorandum of Decision (Joint App. 38-64) in which it determined -- largely on the basis of "test" evidence -- that the defendant's agents had indeed engaged in racially discriminatory rental practices violative of 42 U.S.C. 3604^{3/} and that the defendant would

^{3/} In the consent decree of December 18, 1974, White had denied all allegations of wrongdoing. (Joint App. 23.)

therefore be liable for actual damages.^{4/} On the other hand, the court concluded that punitive damages were unwarranted; and, while it awarded costs to the plaintiffs, it declined to award them attorneys' fees.

On March 27, 1975, the plaintiffs filed a Motion to Reconsider Denial of Counsel Fees and Punitive Damages. (Joint App. 67-70.) The court denied that motion on April 2, 1975 (Joint App. 67) and entered judgment on June 30, 1975. This appeal followed.

C. The Denial of Attorneys' Fees^{5/}

In denying the plaintiffs' request for attorneys' fees, the district court reasoned that (1) the policy considerations underlying the Newman-Northcross presumption^{6/} in favor of such fees are inapposite to an action under the Fair Housing Act because of the availability of damage recoveries under that Act

^{4/} Only nominal actual damages were, in fact, awarded, however, because the plaintiffs apparently did not attempt to prove actual damages suffered by them. (See Joint App. 51-2.) The court understood them to have sought monetary relief "only on a punitive theory." (Joint App. 39-40 and note 2 at 40.)

^{5/} See Joint App. 56-64.

^{6/} See pp. 1-2, supra.

(Joint App. 60); (2) the court was thus free to "balance the equities involved in the case" (Joint App. 62); and (3) the presumed inability of private plaintiffs, in a case like this, to pay counsel fees^{7/} is outweighed here by the fact that White's liability "is based entirely on unauthorized actions of his employees attributed to him through the doctrine of respondeat superior ..." (Joint App. 63). In addition, the court seems to have rested its decision on a conclusion that -- in view of the December 18, 1974 consent decree and an explicit representation, in chambers, apparently on the same day, that they "were no longer seeking certification of their suit as a class action" (Joint App. 39) -- the plaintiffs had not acted in the role of "private attorneys general." (See note 10 at Joint App. 63.)

^{7/} The court appears to have assumed, though it did not actually find, that the plaintiffs are unable to undertake payment of their attorney's fee. (See Joint App. 63.)

ARGUMENT

THE DISTRICT COURT ERRED IN REFUSING TO
APPLY THE NEWMAN-NORTHCROSS RULE TO PLAIN-
TIFFS' REQUEST FOR ATTORNEYS' FEES

The traditional rule in non-diversity litigation in the federal courts is that a litigant's attorneys' fees are not ordinarily recoverable absent specific statutory or contractual authorization. See, e.g., Hall v. Cole, 412 U.S. 1, 4 (1973); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717-8 (1967). This so-called "American rule" derives from an early decision in which the Supreme Court overturned a circuit court's inclusion of counsel fees in a damages award on the ground that "[t]he general practice of the United States is in op[p]osition to it." Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). With certain judicially-created exceptions, see, e.g., Vaughan v. Atkinson, 369 U.S. 527 (1962) (bad faith, wantonness of losing party); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) ("common benefit" theory), none of which is pertinent here, the rule has been consistently adhered to. E.g., Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975); F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116, 128-31 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., supra. It is, however, as the district court recognized (Joint App. 61-2), inapplicable to the present case, for the Fair Housing Act, under which this suit was brought

contains a provision expressly authorizing the courts to award

reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

42 U.S.C. 3612(c). The question addressed herein is whether, under this provision, successful private plaintiffs are presumptively entitled to awards of attorneys' fees as "private attorneys general."^{8/} We believe that they are (see pp. 10-14 infra).^{9/} Further, the reasons given by the district court for making the opposite finding -- the availability of damages and the suggestion that the appellants were not essentially the "prevailing party" -- do not, in our judgment, comport with the purposes underlying the awarding of attorneys' fee or the facts and circumstances of this case (see pp. 14-20, infra).

^{8/} We do not address the related question whether a court may award counsel fees on a "private attorney general" theory in a suit under 42 U.S.C. 1982, because appellants do not claim they are entitled to attorneys' fees under that statute (Brief, p. 9).

^{9/} The narrow, no. statutory decision in Alyeska is not to the contrary. See 421 U.S. at 260-69.

1. The "Private Attorney General" Doctrine

The "private attorney general" doctrine had its origin in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), an action under Title II of the Civil Rights Act of 1964, in which the Supreme Court -- construing section 204(b) of that Act, 42 U.S.C. 2000a-3(b)^{10/} -- held that

one who succeeds in obtaining an injunction under ... Title [II] should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.

Id. at 401. This holding rested upon the following reasoning:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees -- not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

^{10/} 42 U.S.C. 2000a-3(b) provides, in pertinent part:

In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs,

Id. at 401-2. Five years later, in Northcross v. Board of Education, 412 U.S. 427 (1973), a school desegregation case, the Court reached the same conclusion. Construing section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617,^{11/} it stated:

The similarity of language in §718 and §204(b) [of the Civil Rights Act of 1964] is, of course, a strong indication that the two statutes should be interpreted pari passu. Moreover, "the two provisions share a common raison d'etre. The plaintiffs in school cases are 'private attorneys general' vindicating national policy in the same sense as are plaintiffs in Title II actions. The enactment of both provisions was for the same purpose -- 'to encourage individuals injured by racial discrimination to seek judicial relief...' [citations omitted]. We therefore conclude that, as with §204(b), if other requirements of §718 are satisfied, the successful plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S., at 402.

^{11/} 20 U.S.C. 1617 provides, pertinently:

Upon the entry of a final order by a court of the United States against a local educational agency, a State ..., or the United States ..., for failure to comply with any provision of this chapter or for discrimination on the basis of race ... in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment ... as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

412 U.S. at 428. Lower courts have applied the Newman reasoning and result in housing discrimination cases under Title VIII. Jeanty v. McKey & Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Stevens v. Dobs, 373 F. Supp. 618 (E.D. N.C. 1974). See also Hairston v. R & R Apartments, 510 F.2d 1090 (7th Cir. 1975); Marr v. Rife, 503 F.2d 735 (6th Cir. 1974); Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973).

Similarly, Newman has been applied in employment discrimination cases under Title VII (the statutory authorization for awards of attorneys' fees is in 42 U.S.C. 2000e-5(k)). See, e.g., Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971); Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970). The Supreme Court has observed: "[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

The district court did not challenge the Newman-Northcross holding and, indeed, acknowledged the "fair amount of authority for the proposition that Newman and Northcross govern claims for attorneys' fees in housing discrimination cases."

(Joint App. 59-60.) The court concluded, however, that the predicate for the statutes at issue in Newman and Northcross is not applicable here. It concluded those statutes were based on the assumption that the inability of most persons injured by racial discrimination to sustain the financial burden of seeking judicial redress, absent some compensation to defray their expenses, could result in a dearth of private suits essential to the accomplishment of public aims of high priority. It found this assumption inapposite to an action under Title VIII because, unlike the statutes at issue in Newman and Northcross, Title VIII provides for recovery of damages. Accordingly, the court refused to apply the Newman-Northcross presumption to this case. (Joint App. 60-61.) In our view, that refusal was error.

The achievement of fair housing throughout the United States, 42 U.S.C. 3601 -- like the elimination of discrimination in public accommodations, the desegregation of public schools, and the accomplishment of equal employment opportunities -- is a task to which Congress has accorded the highest national priority. Trafficante v. Metropolitan Life Insurance Co., supra, 409 U.S. at 211. And, like these other tasks, see Newman, supra, 390 U.S. at 401; Northcross, supra, 412 U.S. at 428; Alexander v. Gardner-Denver Co., supra, 415 U.S. at 45, it is one which requires the participation of private persons; indeed, "complaints by private persons are the primary method of obtaining compliance with the

[Fair Housing] Act." Trafficante at 209. Recognizing this, the Supreme Court has concluded that, like Title II plaintiffs, Title VIII complainants "act not only on their own behalf but also 'as private attorneys general...'" Id. at 211. It follows that the concerns which prompted the Newman-Northcross rule are equally applicable in the Title VIII context, and the same result should obtain.

2. Availability of Damages

We submit that the availability of damage recoveries under Title VIII does not warrant a different conclusion, particularly in the present case.

It is, of course, true, as the district court here noted (Joint App. 60), that, in Newman, the Supreme Court adverted to the unavailability of monetary relief under Title II (see 390 U.S. at 401-2). A careful reading of the Newman opinion discloses, however, that that reference came in the context of a preliminary discussion of the public nature of Title II suits; is supportive of that discussion; and is not the basis of the Court's ultimate conclusion that, absent special circumstances, a successful Title II plaintiff should recover counsel fees.

That the Court does not view the existence or non-existence of a damage remedy as dispositive of the question

whether attorneys' fees should be granted under a statute providing for them is, we believe, also implicit in its later decision in Alyeska. There -- collecting in a footnote the myriad federal statutes authorizing federal courts, in varying circumstances, to award attorneys' fees in non-diversity litigation (421 U.S. at 260 and n. 33) -- the Court observed that, in many instances, such provisions represent a Congressional decision

to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation.

Id. at 263.

While it discussed Newman in arriving at this conclusion (id. at 261-2), the Court did not refer to its damages language in that case; moreover, it expressly noted that the antitrust laws require "allowance of attorneys' fees to a plaintiff awarded treble damages..." (id. at 261). Thus, Alyeska strongly suggests that the reference to damages in Newman was not intended, and should not be interpreted by the courts, to indicate that attorneys' fees under authorizing statutes are precluded where damages are sought or available.

The purpose of a compensatory damage award is to make the victim whole, to compensate him for economic or other injury suffered as a result of discrimination. See, e.g., Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4884 (S. Ct., June 25, 1975) (equal employment opportunity and back pay). Such an

award, although it may indirectly served a public purpose,^{12/} primarily serves the purely private and personal purpose of placing the victim of discrimination in approximately the financial position he would occupy but for the discrimination. By contrast, the purpose of awarding attorneys' fees is, as Alyeska teaches, "to implement public policy [by] encourag[ing] private litigation" (421 U.S. at 263). The courts have recognized that this latter purpose is served by an award of counsel fees irrespective of whether a plaintiff seeks or obtains injunctive relief, monetary relief, or both. For example, in Marr v. Rife, supra, 503 F.2d 735 (6th Cir. 1974), plaintiffs who sued under the Fair Housing Act were awarded nominal compensatory damages and costs but neither injunctive relief^{13/} nor attorneys' fees (id. at 743). The Sixth Circuit, in remanding the case for the district court to reconsider the amount and allocation of

^{12/} While the availability of damages can serve as some encouragement to vindicate Title VIII rights, damage awards can be substantially consumed by attorneys' fees, thereby diluting the encouragement. See Stevens v. Dobs, 373 F. Supp. 618 (E.D. N.C. 1974).

^{13/} The opinion does not indicate if injunctive relief was sought, although the court's description of the chronology of events makes it unlikely (503 F.2d at 737).

damages and costs, also found that the Newman rationale was applicable (ibid.) and concluded (id. at 774):

To deny appellants any recovery for attorney fees when they were at least partially successful in their suit would, we believe, be inconsistent with the policy favoring the award of attorney fees.

Similarly, in Jeanty v. McKey & Poague, Inc., supra, the Seventh Circuit -- remanding for consideration of additional compensatory damages and reconsideration of punitive damages -- also increased the district court's award of attorneys' fees from \$400 to \$1000, holding that Newman "is equally applicable to a Title VIII action" (496 F.2d at 1121). And in Evans v. Sheraton Park Hotel, 503 F.2d 117 (D.C. Cir. 1974), a Title VII case, the court concluded that it was reasonable to award an attorneys' fee where the relief included \$1600 in damages. See also, e.g., Lea v. Cone Mills Corp., supra; Parham v. Southwestern Bell Telephone Co., supra.

In sum, the availability or recovery of damages in suits like this one has not heretofore been seen as a predicate for not applying the Newman-Northcross rationale,^{14/} and the purposes

^{14/} The district court acknowledged that application of its rule in this case led to "no damages ... although the defendant is found liable" (Joint App. 61, n. 9) but attributed this result "to the legal theory on which plaintiffs' counsel proceeded" (ibid.). The court then went on to suggest that the presentation

(Footnote cont'd on next page)

underlying the presumption suggest that the Marr, Jeanty, and Evans courts have properly followed Newman.

3. Plaintiffs as "Private Attorneys General"

The district court also predicated its denial of attorneys' fees on the ground that plaintiffs had not "acted as private attorneys general, achieving a result that aids a class broader than themselves." (Joint App. 62, n. 10.)^{15/}

We note first that, in this Circuit, the burden of proving a contribution to a consent decree or other conclusion to litigation in a consolidated or parallel action rests upon those in the plaintiffs' position. Wechsler v. Southeastern Properties, Inc., 506 F.2d 631, 635 (1974) ("Causation must ... be shown and the burden of establishing it remains with the plaintiff").

^{14/} (Cont'd from preceding page)

of other legal theories might have resulted in much more than a nominal \$1.00 in damages, thereby increasing the money available for payment of counsel fees.

This reasoning, we submit, is simply inconsistent with the policy underlying the statute as we have argued in the foregoing text. It also ignores the substantial contributions of the plaintiffs to the consent decree (see pp. 19-20, infra).

Certainly, if the district court's rule were correct, a case in which liability is found but damages are not recovered would present an appropriate exception to that rule.

^{15/} The court considered this question in its discussion of possibly awarding attorneys' fees under 42 U.S.C. 1982. Although, as noted above (see n. 8, p. 9, supra), plaintiffs-appellants now make no claim under that statute, we address the court's discussion of the plaintiffs as private attorneys general because it is, we believe, equally pertinent to their Title VIII claim.

Second, the record demonstrates that, in this case, unlike the situation in Wechsler, the plaintiffs and their counsel were of "direct assistance to the Attorney General" (id. at 634-35), both in bringing the unlawful conduct to the government's attention and in contributing to the single consent decree which resolved the injunctive aspects of the two lawsuits against defendant-appellee. As the undisputed record reflects (Joint App. 69-70), the private plaintiffs furnished the Department of Justice with information concerning the defendants' alleged discrimination and thereafter "actively participated in the negotiation of the consent decree" (Joint App. 70). The consent decree itself explicitly recites that "the Court has consolidated the two cases for purposes of this Decree" (Joint App. 23), and it was signed by counsel for the private plaintiffs, as well as counsel for the United States and the defendants (Joint App. 34-5).^{16/} Thus the record establishes that plaintiffs contributed substantially to the successful resolution of the injunctive aspects of the two lawsuits.^{17/}

^{16/} The consent decree did not contain a specific reference to the question of attorneys' fees (see Joint App. 33-4). The district court found no barrier in this omission, however, but, rather, rejected an award of counsel fees for reasons we contend, in the text, were erroneous.

^{17/} By contrast, the party seeking attorneys' fees in Wechsler was found not to have been "of any direct assistance in bringing about the settlement" (506 F.2d at 633) in a separate action initiated by the Attorney General of New York which this Court found to have "not only predated but inspired Wechsler's suit" (id. at 636).

Accordingly, the only appropriate conclusion is that

the plaintiffs may be recognized as having rendered substantial service both to the [defendant him]self, by bringing [the company] into compliance with its [statutory] mandate, and to the community at large by securing for it the benefits assumed to flow from ... nondiscriminatory [housing].

Bradley v. School Board of the City of Richmond, 416 U.S. 696, 718 (1974). They were, therefore, a prevailing party, see Parham v. Southwestern Bell Telephone Co., supra, 433 F.2d at 18/ 429-30, and are entitled to an award of attorney fees.

Since, in our view, the judgment below must be reversed, we note one further matter which should be considered on remand: Title VIII provides that attorneys' fees are available "Provided, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees" (42 U.S.C. 3612(c)). The district court made no finding on this issue,

18/ In our judgment, counsel fees should have been awarded at least for the period up to and including the entry of the consent decree. While we believe that such an award is also appropriate for counsel's services during the post-consent decree period, including this appeal, see Parham, supra at 430, the impact of the Newman-Northcross presumption to that period should probably be resolved by the district court in the first instance, unfettered by the conclusion that the availability of damages under Title VIII makes the presumption inapplicable.

however, but essentially assumed, arguendo, that plaintiffs-appellants are unable to pay their counsel (Joint App. 63). The court should be directed to make an explicit finding with respect to this issue.

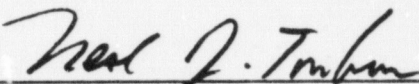
CONCLUSION

For the foregoing reasons, the judgment below denying an award of attorneys' fees should be reversed.

Respectfully submitted,

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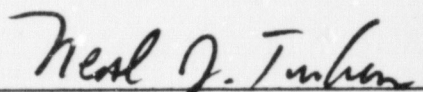
I, Neal J. Tonken, hereby certify that I have this day served the foregoing Brief for the United States as Amicus Curiae on the parties to this case by mailing two copies to their respective counsel, first class, postage prepaid, at the following addresses:

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